

THE

R I G H T

OF THE

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ELDEST SONS

OF THE

PEERS of SCOTLAND

TO REPRESENT THE

COMMONS of that Part of GREAT BRITAIN
in PARLIAMENT,

C O N S I D E R E D.

PRINTED IN THE YEAR MDCCXC.

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30.10.85

THE
RIGHT
OF THE
Eldest Sons of the Peers of Scotland,
 &c. &c. &c.
CONSIDERED.

THE House of Commons having lately declared a Seat vacant, in consequence of a Rule, supposed to have obtained in Scotland, before the Union, that the eldest Son of a Peer is incapable of representing the Commons in Parliament, those immediately interested were led to consider, Whether there really was such a Rule of Law, and upon what Foundation a Notion so singular could rest? A noble Lord* favoured the Public with his Thoughts on the Subject, dictated by a Regard to his Order, and a Spirit of free Inquiry, which does him honour. Since that Publication, much Light has been afforded by the Researches and Observations of another noble Lord†; and their Labours make it an easy Task to state the Merits of the Question clearly and concisely, for the Information of those who have not Leisure or Inclination to peruse the Argument and Authorities at large.

* Lord Saltoun.

† Lord Daer.

1560.

It may be remarked in the Outset, that those who are most concerned in the Question profess to aim, not at the *Acquisition*, but at the *Recovery*, of a Privilege: not to *alter* a Part of the Constitution, but to *restore* it. There is a wide Difference between recurring to theoretical Principles, and asserting a constitutional Right once acknowledged, and abolished by no Law, the Exercise of which is alleged to be suspended only, either from those entitled not claiming it, or from the erroneous Decisions of Judges. The Right of electing to Parliament cannot be lost by disuse. There are many Instances in England of Places, which had neglected to send Representatives for Centuries, being restored to the Franchise, whenever it was claimed. Much less can the Capability of being elected be lost, for that is the Birth-right of every Subject not excluded by positive Law. The History of Scotland shows that the whole Body of Landholders, other than the Nobility, had neglected to attend Parliament, for so long a Time, that their Right came to be doubted; but it was recognized as soon as the ancient Practice was ascertained. In later Times, there is an Instance of a County in that Kingdom being restored to the Right of sending Representatives after long disuse.

A Decision of the proper Judicature, That a Person is incapable of being elected, though it binds the particular Case, and the Parties, irrevocably, cannot alter the Law, even when it professes to lay down a general Rule. If the Existence of the Right is proved in a subsequent Case, no liberal Man will oppose the Resumption of it; and if the Error of former Determinations is demonstrated, Judges are bound to reverse the Principle.

Upon these Grounds, the Claim of the Eldest Sons of the Peers of Scotland shall here be considered. It is not meant to introduce Arguments from Expediency; to ask, Whether it is reasonable to exclude for a Time, from the Legislative Body, Men, who, by their Birth, must one Day make a Part of it? to exclude them at a Time of Life when they can be most useful, because they *may be* included at an after

uncertain Period? or, Whether a Distinction ought to be made between the Sons of English and of Scots Peers, whilst Mr. Hatfell's Position is indisputable, that, " It is of great Importance that young Noblemen should pass through the House of Commons to the House of Lords, as a School in which they hear the first Principles of the Constitution ably and freely debated, and where they acquire Ideas of Freedom and Independence, and contract Habits of Business?"

Precedents,
Vol. ii. p.
13.

That the eldest Son of a Peer of Scotland is incapable of being elected to represent a County or a Borough in that Part of Great Britain, is a Proposition for which no *written* Authority can be produced, except two Resolutions of the Parliament of Scotland; one in 1685, and another in 1689, and a Resolution of the British House of Commons in 1708. There is not a Word in the Statute Book to give Countenance to it. There is not a Syllable to that Purpose in any Writer upon the Law of Scotland before the Union.

Though there is reason to think, the first of those Resolutions in the Scots Parliament passed without Observation or Consideration, and the second with very little; though both appear to have originated in Party; and though the Resolution of the British House of Commons seems to have had no Foundation but the Scots ones; it may readily be admitted, that the Resolutions are entitled to Respect, especially after the last has been so long seemingly acquiesced in; that they are *prima facie* Evidence of the Law; and that it lies upon those who impugn them, and the Evidence they afford, to show in the most satisfactory Manner that they were erroneous. If that can be done, it will not be said that Error should be persisted in. It will not be contended by any Person acquainted with legal Principles, that those Resolutions have the Force of general Laws, and much less that general Law could in that Shape be abrogated.

This is what the eldest Sons of the Peers of Scotland must undertake to do. And as the Resolutions, though not supported by written Law, may be supposed to have been founded in unwritten Law or Custom,

Custom, unless the contrary is proved, it is necessary to show what the Law and Custom of Scotland, in ancient Times, was in this respect.

It is therefore proposed here; 1st, To shew, that by the Constitution of the Parliament of Scotland, prior to the Year 1587, when the Representation of the Counties was established, the eldest Sons of Peers, when possessed of Qualifications, must *of necessity* have been, and in fact were, constituent Members. 2dly, To consider, whether the Act passed in 1587, which dispensed with the Attendance of the Landholders under the Degree of Peers, and required that they should appear thereafter, by their Representatives, or any subsequent Statute, excluded the eldest Sons of Peers from choosing, or being themselves chosen, parliamentary Representatives of the Landholders. 3dly, To give an Account of the Resolutions and other Transactions in Parliament since the Year 1587, which are supposed to affect the Right of the Peers eldest Sons; and make some Observations upon them. And, lastly, To consider the Arguments used by Writers and others, who contend for the Exclusion, or suppose it a Point settled.

Constitu-
tion of the
Scots Par-
liament
prior to
1587.

I. The Parliament of Scotland differed in its Constitution and Form of Proceedings from the Parliament of England in several Particulars. From the earliest Period, down to the Time of the Union, the Lords and Commons formed but one House, and voted promiscuously. The Parliament consisted, however, of three distinct Bodies or *Estates*, which were a Check on one another, in some Points, unnecessary to be here mentioned. The first *Estate* was that of the Clergy, composed of the Prelates and other Dignitaries. The second was composed of all the Landholders, Tenants of the King *in capite*, whether Lords or Commons, and whether their Estates were great or small, under the Denomination of Barons or Freeholders; for the Term *Freeholder* is in Scotland applied only to those who hold Lands of the Crown. The Representatives of the Royal Burghs made the third Estate. At what Period they were introduced into Parliament is not known; but, comparatively with the Barons, it was at a late one.

Parliament

Parliament was originally no other than an Assembly of the King's Vassals in his Court, as paramount Lord, or Superior, of all the Lands in the Country. The Attendance was an Obligation, necessarily arising from their Tenure, in the same way as the Vassals of Mesne Lords, or Subject Superiors, were bound to give Suit and Presence in their Courts. Hence, none but the *immediate* Vassals of the Crown were admitted, or, more properly speaking, were *compellable to attend* Parliament, and all who held immediately of the Crown were constituent Members. Hence, likewise, the Introduction of the Representatives of Royal Burghs. The Burghesses held their Lands and Tenements severally of the King, and every one of them was entitled, as his Tenant, to a Seat in Parliament; but, that being inconvenient, they were allowed to attend by their Representatives. Lord Stair, treating of the Feudal System, writes thus: "In Scotland the King, as supreme Superior, ruleth *by his Vassals assembled in Parliament*, in which, at first, all were personally present, who held Lands immediately of him; as Barons, great and small Freeholders of any Moment, holding a Forty Shilling Land, of old Extent, of the King, and Prelates for Church Lands. The free Burghs were also represented in Parliament by their Commissioners, as holding the Burgage Lands, and their Freedoms and Privileges, as Feudatories of the King: so that there was not one Foot of Ground in Scotland whose Lord was not present in Parliament, by himself or his Delegate. But when Feus holden of the King came to be subdivided and multiplied, two or more Commissioners were admitted in Parliament, in Name of the meaner Barons or Freeholders." To the same Purpose, Lord Bankton: "Originally with us, *none had a Seat in Parliament but those possessed of a Freehold of the King*. Thus the Bishops, and likewise the Peers, sat in respect of their Baronies, all Nobility and Peerage being of old territorial; and the other Freeholders were all entitled to sit in Parliament, *and bound to attend*, till the Small
" Barons,

Lord
Kaimes's
Essays on
British An-
tiquities,
and other
Authorities.

Lord Stair's
Institutions,
B. 2. Tit. 3.

Lord Bank-
ton's Insti-
tute, B. 4.
Tit. 1. § 8.

“ Barons, *as a Privilege*, were exempted, and allowed to choose Commissioners to represent them.”

The three *Estates* of Parliament continued as above mentioned till the Revolution, when the Estate of the Clergy being annihilated, and it being reckoned necessary, as it would seem, still to have the Name of *three Estates*, the Nobility were separated from the other Landholders, and made the first Estate. The Representatives of those other Landholders, or Lesser Barons, as they were called (for Representation in Counties had some Time before taken place, as shall be afterwards mentioned), made the second Estate. And the Burgh Representatives continued to be the third.

Cafe of Lady
Sutherland,
by Lord
Hailles,
chap. 4.

Hereditary Titles of Nobility were conferred by the King, in Scotland, from the most ancient Times of which any Record remains. It is certain that these Peerages were anciently territorial, and passed with the Land; as the Authorities quoted above, and many others which might be referred to, shew. They were afterwards personal, conferred by Patent, or by Investiture in Parliament. Those who held such Honours, came to be called *Noblemen*, *Lords of Parliament*, and *Greater Barons*, to distinguish them from the Freeholders, or *Lesser Barons*, but still they continued of the same *Estate*, with the general Body of the Freeholders or Barons; nor is there any Reason or Authority for thinking, that, *in Parliament*, they enjoyed any Privilege beyond the Lesser Barons, except that of Rank and Precedency. It may be supposed, that after Peerages came to be conferred without Regard to any particular Territory, the Holders were considered as constituent Members of Parliament, and that they sat *as Peers*, rather than *as the King's Vassals*; though it is scarcely to be imagined, that there ever was one of them without Lands held of the King, and consequently not entitled to attend Parliament, and to be of the same *Estate* as a Freeholder, independent of his Peerage. The *Obligation* might thus in Idea be changed into a *Privilege*, analogous to the hereditary Counsellorship annexed to the

Peerage

Peerage in England. But, however that may be, the Estate of the Barons, including both the Greater and Smaller, was still considered as *representing the Land of the Kingdom*, and they were all, so far as is known, upon the same Footing, when met.

It is proved indisputably, by the Records, that before the Introduction of Representatives for the Counties, eldest Sons of the Peers or Nobles attended Parliament, and were accounted as belonging to the Estate of Barons or Landholders, Tenants of the King *in capite*. Upon this, the present Question mainly hinges; and it is therefore hoped, that those who wish to form a fair Judgment upon it, will attend to the Fact, and the necessary Inferences from it.

That there should not be many Instances of the eldest Sons of Peers attending as constituent Members, is not wonderful; because none but those who held *freehold* Lands in their own Right, could attend, or were admissible. One Instance, well authenticated, would afford Evidence of what is meant to be established, as good as a thousand. But there are many, and in such various Situations, as serve to refute all the Suppositions of those who, forced to admit the Fact, endeavour to explain it, in Consistency with the Hypothesis of the Peers Sons not being *efficient* Members.

There are no authentic Rolls of the Members who attended Parliament till the Year 1466, [in the Reign of James III. but from that Time, the Records are existing in tolerable Preservation, down to the Union in 1707. At the opening of each Parliament, or Session, there is generally a Roll containing the Names of the Members then present, or, in the later Times, containing the Names also of all who appear to have attended on future Days, during the Session.

See Copies
of the Rolls,
in the Ap-
pendix.

A Search of the Records has afforded the Names of above thirty eldest Sons of Peers in Parliament, most of them sitting in two or three different Parliaments; so that, on the whole, there are Instances, to the Number of fifty-seven or thereby, of their being present. The first, is on the 1st of March 1478-9, and the last, on the 29th of

B

November

In the Cottonian Library.

November 1558; after which, none are mentioned in the Rolls preserved in the public Register: but besides these, there is a List of the Members of the Parliament or Convention in 1560, well authenticated; by which it appears, that several of the eldest Sons of Peers then attended. That the eldest Sons did not attend as Proxies for their Fathers, as has been ignorantly alleged, is proved by the Fathers sitting at the same Time, in twenty-four Instances; and that they sat and acted as constituent or efficient Members, is demonstrated by the Circumstance of their being appointed on Committees; there is an Instance particularly of the Earl of Huntley's eldest Son being of the Committee of Articles, the Importance of which every one, who is the least conversant in Scots History, knows, and that, while his Father was also attending Parliament.

Kaims's Essay, p. 99.

There is no Reason for supposing, that the Peers Sons, who are thus proved to have attended, sat in any other Character than that of Lesser Barons, or Freeholders, entitled by their private Properties. Lord Kaims, in his Essay on the Constitution of Parliament, says, "In later Times (meaning not long before 1587), the Barons by Tenure, who attended Parliament, were mostly the eldest Sons of the Nobility *infeft in* (i. e. seized of) *Lands, to entitle them to a Seat there.*" It is not easy, at this Distance of Time, considering the Change of Property, and the Imperfection of the Register of Charters and *Seafins*, to ascertain what precise Lands were enjoyed by the Peers eldest Sons who are marked as sitting in Parliament; but in sundry Instances it can be proved by the Records, that they actually had, in their own Right, Estates entitling them to sit as Lesser Barons. According to feudal Principles, if the eldest Son of a Peer, possessed Lands held of the King, he must of *Necessity* have attended Parliament or forfeited his Estate; unless recourse is had to so wild a Supposition, as that the King in every such Case dispensed with the Attendance; and therefore, though the Records had not afforded a single Instance of a Person, in that Situation, attending, the only Inference would have been, that no eldest Son of a Peer had happened

to

to be possessed of freehold Lands ; but the Right in Law would have been the same. If the eldest Son of a Peer succeeded to a Dignity, or Greater Barony, by the maternal Line, or by collateral Succession, it will not be contended, surely, that he was incapable of sitting in Parliament, by virtue of that Title, though at the same Time apparent Heir of his Father's Dignity ; and, by Parity of Reason, and in precise Conformity with the Constitution, if he succeeded to a *Lesser* Barony, or acquired one during his Father's life, he must have been instantly intitled to a Seat as a Lesser Baron.

The Conclusion from all this, may be laid down with perfect Confidence, *That, prior to the Year 1587, the eldest Sons of Peers were admissible to Parliament, like other Landholders, and when there were of that Estate or Class which corresponds to the Representatives of the Commons, in modern Times.*

II. The next Thing to be considered, is, the Alteration made in the Constitution of Parliament, by allowing Representatives for the *Lesser Barons*, instead of compelling their personal Attendance ; and Whether the eldest Sons of Peers who happened to be Lesser Barons, possessed of Freeholds in their own Right, and who had previously been entitled to sit in Parliament, were excluded from having a Voice in the Election of those Representatives, or from being themselves chosen.

Alteration
in the Con-
stitution of
the Scots
Parliament.

It has been mentioned, that attending Parliament was a feudal Obligation or Burden accessory to the Tenure. The Burden was, of course, most felt by those who had small Possessions, and their Number, by the splitting of Property, was continually increasing. By an Act of James I. in 1425, the personal Attendance of all Freeholders, without Distinction, was strictly required. It is probable that this was complained of as a Grievance ; because, within two Years after (1427), another Act was passed, dispensing with the Attendance of the *small Barons and free Tenants*, provided they sent two Representatives or Commissioners from each Sherifffdom. It was thus left optional to attend in Person or by Representation. The Term, *Small Barons*, in this Act, is used in

the literal Sense, signifying those who had small Properties, and not, as it came afterwards to be used, in Contradistinction to the Greater Barons or Peers. Accordingly, by subsequent Statutes, in the Reigns of James II. and IV. the Extent of the Property which intitled the Holder to Dispensation from personal Attendance, and to choose Representatives, is precisely ascertained. During the Period from 1427 to 1587, the *Estate* of the Barons in Parliament might have been distinguished into three Classes. 1st, The Greater, or Nobility. 2d, The Barons, or Freeholders, under the Degree of Nobility, but possessed of Estates of too high a Value to be permitted to sit by Representatives. And 3d, The Representatives of the Small Barons. But, in fact, the Privilege given by the Acts prior to 1587, was never exercised. The Barons Estate in Parliament was composed as formerly of the Peers, and Barons under the Degree of Peers, who chose to attend, including the eldest Sons of Peers who happened to be possessed of freehold Lands, in their own Right. By the Roll of the Convention Parliament, held in 1560, there appear to have attended, 28 of the Clergy; 33 of the Nobility, amongst whom are particularly to be remarked, the Earls of Marishall and Glencairn, and the Lords Somerville and Lindefay; 101 Lesser Barons, amongst whom are five eldest Sons of Peers, the *Masters* of Marishall, Glencairn, Somerville, Lindefay, and Sinclair; and 22 Commissioners or Representatives of Burghs. The eldest Sons of Peers, at that Period, were distinguished by their Father's Title, with the Addition of *Master*. Thus, Lord Marishall's eldest Son was styled, *The Master of Marishall*. His second Son would have been called Mr. Keith.

James VI.
Parliament
II. C. 114.

In the Year 1587, an Act was passed which deserves particular Attention. It recites the Act of James I. 1427, ratifies it, and directs, that it should be carried into Execution in Time coming. And it enacts, That *Commissioners to Parliament* should thereafter be elected for each County, and that *all Freeholders of the King, under the Degree of Prelates and Lords of Parliament*, should be warned by Proclamation to be present at the choosing of the Commissioners, and those who had

a forty Shilling Land in free Tenantry, holden of the King, should have Voices in the Election. The Act concludes with a Declaration, " That the Appearance of the said Commissioners of the Shires in Parliaments and general Councils, should *relieve* the Whole other Small Barons and Freeholders of the Shire of their Suits and Presence in Parliament."

Though this Act does not expressly discharge the Barons and Freeholders, under the Degree of Prelates, and Lords of Parliament, from personal Attendance, yet it was so understood. What has been repeatedly mentioned, That the Attendance was considered as a Burden, not as a Privilege, is a Key to this, as well as other Things. They were to be *relieved* from Suit and Presence, if they sent Commissioners; and, as it was not to be supposed that any would reject that proffered Relief, the Clause was tantamount to expressly debarring personal Attendance.

Accordingly, from the Time of passing this Act, none of the Lesser Barons appear to have sat in Parliament but as Representatives by Election, and Representatives were regularly chosen for the Counties.

From this Period, the Term Smaller or *Lesser Barons* was applied strictly to all Freeholders under the Degree of Lords of Parliament, holding Lands of the Extent mentioned in the Act, and the Term *Greater Barons* distinguished the Peers. But still the Greater Barons, and the Representatives of the Lesser, made only *one Estate* in Parliament.

From this Period too, it is admitted, that the Name of no eldest Son of a Peer is to be found in the Rolls of Parliament that are extant, nor is there any other Evidence that they sat, or attempted to sit, till the End of the following Century. From hence, it has been argued, That this Act of 1587 *must have been understood* to exclude them from a Voice in the Election of the Representatives of the Lesser Barons, and from being themselves elected. So the Argument, if it deserves the Name, must be stated; for it cannot be pretended, that the Act contains one Word, which can be wrested into any Thing like a direct Exclusion, or one Expression which can with any Propriety be said to be aimed at the Peers Sons in particular. The only Colour
which

which the Argument derives from the Act, is the Coincidence of its Date, and of the eldest Sons of Peers ceasing to appear in Parliament. Even this might be disputed; for, in fact, they had ceased attending, if their Non-appearance in the Rolls can be called so, thirty Years before; and there are no Rolls extant for 27 Years after, in which Period there were frequent Parliaments: so that, for ought that is known, the eldest Sons of Peers may have been elected, and have sat as entitled by the Terms of the Act 1587.

The eldest Sons of the Peers have no Occasion to prevent their Opponents from making any Use they please of this Act, and of every other in the Statute Book. In return, they may found upon it, as decisive of the Question in their favour.

It seems a fair Argument, That, whether the eldest Sons of Peers sat in Parliament before this Time or not, yet, under the general comprehensive Words of the Act 1587, which grants the Privilege of electing, and consequently of being elected Commissioners, *to all Freeholders of the King under the Degree of Prelates and Lords of Parliament*, the eldest Sons of Peers, having Freeholds, are included, because it is impossible to maintain that they were at the passing of this Act, called or understood to be *Lords of Parliament*. It might as well be said, that they were *Prelates*. *Lord of Parliament* is a Term of Description synonymous with Greater Baron, in contradistinction to Lesser Baron, or a Person of inferior Order, and corresponds almost exactly to the English Term, *Peer of Parliament*. In Scotland, when a Person of an inferior Order was to be made a Noble of the lowest Class, it was not done by creating him a Baron, or granting him a Barony, as in England; but it was, by creating him a *Lord of Parliament*, either by Patent, or by Investiture. *Baron*, in the legal Sense of the Term, in Scotland, is a Person, whether Noble or Commoner, who holds Lands with certain Privileges; as the Territory, to the holding of which these Privileges are annexed, is called *the Barony*. In parliamentary Language, *Baron* is a Person who holds Lands in any way of the King, and the same as *Freeholder*.

By

By the Words, *Under the Degree of Lords of Parliament*, in the Act 1587, is meant under *the Rank of Nobility*; and therefore, even supposing it had not been shewn that the eldest Sons of Peers sat in Parliament prior to the Act 1587, as Lesser Barons, by virtue of their Freeholds; or that it could be shewn that they never did; still the fair and legal Conclusion, from the Terms of the Act, would be, that the Privilege of electing, and being elected, Representatives of the Lesser Barons, was meant *to be conferred* on them, when possessed of Freeholds, there not being a Syllable in the Act to exclude them.

But without carrying the Argument that Length, and taking the Act in the Sense in which it has been generally understood, namely, as intended to draw a line of Distinction between the Peers, or Greater Barons, and the Commoners, or Lesser Barons, leaving the *former* precisely in the same Situation they were; that is, constituent Members of Parliament, whose personal Attendance was required; and excluding the great Body of the *latter*, so that, from that Time forward, they should have a Right to sit only by their Representatives; the Act, when coupled with the indisputable Fact of the Peers eldest Sons having been previously admitted, and constantly in use, to sit as Lesser Barons, when they had that Character in them, is decisive, and what they found upon it may be stated in the Shape of a Syllogism.

By the Act of 1587, all Persons then belonging to the *Estate* of Barons, under the Degree of Prelates and Lords of Parliament, were excluded from personal Attendance; and, in lieu of it, a Privilege was conferred upon them of electing, and of being elected, Representatives of the Lesser Barons.

The eldest Sons of Peers, being under the Degree of Prelates, and Lords of Parliament, were of the Estate of Barons, and sat in Parliament when possessed of Freeholds, and consequently were of the Number excluded by the Act from attending personally.

Therefore by the Act, they became, and are, entitled to elect, or to be elected, Representatives.

This

This Act of 1587 is still in force ; and is the Basis of all the Election Laws for Scotland.

The only other Statutes respecting Elections, before the Union, are those of Charles II. Parliament I. 1661. C. 35. and Parliament III. 1681. C. 21. By these, the Estates and Qualifications of the Electors are defined, more precisely than they were by the Act of 1587 ; and Residence in the County, which that Act required, in the elected, is dispensed with ; but the Right of electing, and to be elected, is left, as before, open to all Men possessed of the Qualification in Freehold Land, *excepting Noblemen and their Vassals*. As a particular Exception serves to strengthen a general Rule, it seems impossible to dispute, That the Right of electing, and being elected, was given to the eldest Sons of Peers, being Freeholders ; or, at least, impossible to contend, That if they had the Right formerly, it was now taken away ; unless it can be maintained that they were meant to be described by the Term *Noblemen*, a Term, which in common Language is scarcely ever, and never with Propriety, applied to them, and which certainly was not, nor could be, meant, as a legal Description of them. It was introduced into the Act with Propriety, and stands there as descriptive of the Peers, or Greater Barons, to controul the broad words *all Heritors* (that is, Landholders), which otherwise would have conferred on the Peers a Right to interfere in the Election of the Commons. It is farther to be observed, That the Preamble of the Act 1661 bears, that it was made *to remove all Doubts, as to who were capable of electing or being elected Representatives*. It then declares the Right to be vested in *all Heritors* possessed of Estates, to the Extent therein mentioned, excepting Noblemen and their Vassals. A more express and unequivocal Authority upon the Point now under consideration cannot be figured.

Resolutions
and Entries
in the Jour-
nals of Par-
liament, re-

III. So stood the Law and the Practice, with respect to the eldest Sons of Peers, when the following Entry was made in the Minutes or Journals of the Scots Parliament : “ Edinburgh, the 23d of April,
“ 1685,

“ 1685, In respect, the Viscount of Tarbat's eldest Son, elected one of
 “ the Commissioners for the Shire of Ross, *by reason that his Father is*
 “ *nobilitated*, cannot now represent that Shire, Warrant was given to
 “ the Freeholders of that Shire to meet and elect another Person in his
 “ Place.”

lative to the
 Right of
 Peers eldest
 Sons, with
 Observa-
 tions.

Upon this Resolution, or Memorandum, it shall only be observed here, that the Viscount of Tarbat was Sir George Mackenzie of Tarbat, a noted Courtier and Favourite of James II. of England, and VII. of Scotland, who, at the Beginning of his Reign, raised him to the Dignity of a Viscount. Lord Tarbat held the Office of Register, and as such, was Clerk of the Parliaments, and kept and framed the Acts and Minutes. This Entry is made on the first Day of Meeting; and the Terms of it are taken notice of in no Writer at the Time, nor is there any Reason to suppose that it was attended to. A new Election for Rosshire took place, and therefore it must have been known that Lord Tarbat's Son had vacated his Seat; but on what Account he vacated, might be known to nobody, nor had any one Occasion to inquire. It is undeniable that the Members of the Scots Parliament were in use to surrender their Seats upon the most frivolous Pretences. In the County, for which he sat, a plausible Reason would occur: the whole Estate of the Family, a Part of which made the Qualification of the Viscount's eldest Son, was on the Eve of being disjoined from that County, as it actually was, within six Weeks after. All the Historians and Writers agree (and it is particularly stated by Sir George Mackenzie of Rosehaugh, in his Observations on the Acts of Parliament), that it was the Object of James VI. and his Successors to diminish the Influence of the Nobility, and to throw Weight into the Scale of the Commons in Parliament. To introduce a Precedent, for depriving the eldest Sons of the Peers of their Right to sit in Parliament, was agreeable to this System; and no Period could be more favourable for it, than this of 1685, as no Minister could be more pliant than Lord Tarbat. The Character of this Parliament, in which

Hume's History, 8vo.
Vol. viii.
p. 237.

he was one of the chief Rulers, is given by a single Stroke of Mr. Hume's Pen: "No Courtier, even the most prostitute, could go farther than they, towards a Resignation of their Liberties." And one of the Articles of Grievances voted at the Revolution was in these Words: "That most of the Laws enacted in the Parliament *Anno* 1685, "are impious and intolerable Grievances."

The next, and only other Resolution of the Scots Parliament, respecting this Subject, is entered in the Journals of the Meeting of the Estates or Convention Parliament 1689, in the following Words: "Edinburgh, 18th March 1689, The Meeting of the Estates having heard the Report of the Committee for Elections, bearing, that in the controverted Election for the Borough of Linlithgow, in Favour of the Lord Livingston and William Higgins, it is the Opinion of the Committee, that William Higgins's Commission ought to be preferred; *first*, in regard of Lord Livingston's Incapacity to represent a Borough, being the eldest Son of a Peer; *secondly*, in respect William Higgins was more legally and formally elected by the Plurality of Votes of the Burgeses, they have approven, and approves, the said Report, in both the Heads thereof, and interpones their Authority thereto."

Upon this Case, it is to be observed, that the Petition of Mr. Higgins is extant; and though it is drawn with anxiety, and evidently the Work of no mean Counsel, entering at large into the Proceedings and the Legality of the Votes given for Lord Livingston, yet the Objection of Incapacity is not taken; a Proof that it did not occur to the Counsel, or was not considered as tenable Ground, and that the prior Resolution, in the Case of Lord Tarbat's Son, was not known, or not held to be a legal Precedent. The Incapacity appears to have been a Discovery of the Committee; and we know from the Historians and Annalists of that Period, that Party then run high, and showed itself particularly in the Decision of controverted Elections. The Revolutionists, or Whigs, had the Majority, and were resolved to preserve it, by starting

Lord Balcarras's Memoirs; Sir John Dalrymple's ditto.

every Objection to those of the other Side. Lord Livingston was a Tory, and actually in arms for King James. Higgins was of an opposite Complexion, and soon after a Presbyterian Clergyman. It does not appear that any Defence was set up for Lord Livingston; and it is certain he was not present; for the next Day there was a Proclamation issued, stating that he was at the Head of a Body of Men near Linlithgow, and requiring him to surrender. It may be added, that the Resolution did not pass in a regular Parliament, but in the Convention of the Estates assembled at the Revolution, a Time ill adapted for an Examination into *lesser* Matters of Right.

We pass next to the Period of the Union.

By the 22d Article of that Treaty, it was agreed, That the Number of Representatives for Scotland, in the House of Commons of the Parliament of Great Britain, should be forty-five; and that these were to be elected in such Manner as should be settled by an Act of the Parliament of Scotland, which Act was declared to be as valid as if it were a Part of and engrossed in the Treaty. A Bill was accordingly brought into the Parliament of Scotland, and at last passed into a Law, for settling the Manner of electing the sixteen Peers, and forty-five Commoners, to represent Scotland in the Parliament of Great Britain.

Act 8th,
4th Session
Q. Anne's
Parliament.

While the Bill was under consideration, a Motion was made, to insert a Clause or Declaration, in these Words: "That *no Peer*, nor the " eldest Son of any Peer, can be chosen to represent either Shire or " Burgh, in that Part of the United Kingdom, in the House of Commons." This arose from a prevailing Notion, that the Peers not elected to represent the Nobility in the House of Lords of Great Britain meant to claim the Privilege of being elected into the House of Commons. The Motion occasioned a great Debate; and it was moved, in place of these Words, to insert the following: "Declaring " always, that none shall elect or be elected to represent a Shire or Burgh " in the Parliament of Great Britain, from this part of the United " Kingdom, except such as are now capable by the Laws of this King-

“ dom to elect or be elected as Commissioners for Shires or Burghs to
 “ the said Parliament.” It was put to the Vote, Whether the *first* or
 the *second* Clause should be adopted? and the Majority decided for
 the second. In the Scots Parliament, this was the constant Mode of
 determining between two opposite or different Propositions; and in
 this Case, it was agreed, That the Votes should be marked, and a List
 of the Members, showing how they severally voted, recorded, and
 printed. It appears, by the List, that there voted,

For the <i>second</i> Clause,—Officers of State *	--	6	
Peers	-	55	
Representatives of Counties		5	
Representatives of Burghs		20	
	Total	—	86
For the <i>first</i> Clause,—Officers of State	-	1	
Peers	-	1	
Representatives of Counties		47	
Representatives of Burghs		23	
	Total	—	72
			Majority 14

From hence it is plain, 1st, That the Peers considered the *second*
 Clause, which was adopted, as not excluding their eldest Sons; and
 satisfied with carrying that Point, they appear to have abandoned the ori-
 ginal Design of leaving it open, even to themselves, to be elected; and,
 2^{dly}, That the great Body of the Commons considered it as at least not
 sufficient to exclude Peers Sons; and therefore they pressed for the first
 Clause, which would have done it effectually. The fair Inference from

* A certain Number of the King's Ministers were Members of the Scots Parliament,
 by virtue of their Offices.

the whole, is, That the eldest Sons of Peers were not, in the Opinion of either Party, incapable by the Law, as it then stood; for, if that had been supposed, the Peers gained nothing by the Alteration proposed, and their Opponents had not the least Occasion to struggle against its Adoption; their Purpose being equally answered by either of the Clauses. So far from its being reckoned a clear Point, that the Peers Sons were by the Law and Custom of Scotland incapable of representing the Commons in Parliament, it is noticed by the Reporters of the Debates in the Union Parliament, that the prevailing Argument against the Clause first Proposed, was, "That it had been always allowed in Scotland before, that the eldest Sons of Peers might be elected;" and that this was not contradicted by the Members of the opposite Side.

Defoe's
History of
the Union,
2d Edition,
p. 496.

It being thus settled by the Treaty, That the Right of electing and being elected into the House of Commons of Great Britain for Scotland, should be governed by the Rules which had obtained in that Kingdom before the Union, there were chosen in the Parliament of Great Britain, summoned in 1708, four eldest Sons of Scots Peers; namely, Lord Johnstone, eldest Son of the Marquis of Annandale, for Dumfriesshire, and also for Linlithgowshire; Lord Haddo, eldest Son of the Earl of Aberdeen, for Aberdeenshire; Lord Strathnaver, eldest Son of the Earl of Sutherland, for the Borough of Tain, &c.; and Mr. Sinclair, eldest Son of Lord Sinclair, for the Boroughs of Dysart, &c. Petitions were presented to the House of Commons, complaining of all these Elections. Those against Lord Johnstone, Lord Strathnaver, and Mr. Sinclair, stated various Objections, besides alleging generally, that the fitting Members were incapable of being elected as the eldest Sons of Peers. The Petition against Lord Haddo was confined to the single Point of the Incapacity, and went at large into what were no doubt reckoned *the Merits* of the Case. It is worth while to state the Argument in the Words of the Petition. After mentioning the Terms of the Treaty of Union, and the Relative Act of the Scots Parliament, it proceeds, "That the eldest Son of any Peer of the Realm could not sit as a Commissioner to re-

" present

Commons
Journals,
Nov. 7,
1708.

“ present any Shire or Borough in the Parliament of Scotland, as is evi-
 “ dent from the following remarkable Instances, now extant upon the
 “ Records of Parliament, viz.” [Here the Resolutions of 1685 and
 “ 1689 are quoted] “ That, nevertheless, the Power and Influence of
 “ the Scottish Nobility is so great, that in many Places their eldest Sons
 “ have at this Time been chosen to represent both Shires and Burghs in
 “ the House of Commons of Great Britain, and particularly in the Shire
 “ of Aberdeen ; which the Petitioners conceive is (*at this Juncture*) a
 “ Precedent of that consequence, that, if not prevented, the Electors and
 “ Freeholders in future Time will never be able to withstand so Power-
 “ ful an Interest, but rather, by continual Discouragements, the Majority
 “ of them must become subservient to the Nobility, in distressing all those
 “ who shall have the Courage to resist their incroaching upon, or giving
 “ up, the Rights and Privileges of the Commons : And praying, that the
 “ House will take the Matter into consideration, not only as it relates to
 “ a present Incroachment made on the Petitioners particular Rights and
 “ Privileges, but (what is of far greater Moment) as, in all Probability, it
 “ will, in a very short Time, sensibly affect the very Being and Consti-
 “ tution of a British House of Commons, by bringing our small Repre-
 “ sentation into the Hands of a numerous and powerful Peerage, the
 “ Consequence whereof they have but too great Cause to fear, and sub-
 “ mit themselves, Liberties, and Privileges, into the secure Protection
 “ and wise Provision of a British Parliament.”

Upon these Petitions being presented, the House of Commons appoint-
 ed a Day for taking into consideration that Part of the Act for uniting
 the two Kingdoms which relates to the Election of Members to serve for
 that Part of Great Britain called Scotland. And it appears by the Jour-
 nals, that, upon the 3d of December 1708, Counsel were heard, and the
 Petitions and Representations relating to that Matter were again read ; and
 a Motion being made, and the Question put, “ That the eldest Sons of
 “ the Peers of Scotland were capable, by the Laws of Scotland at the
 “ Time of the Union, to elect or be elected as Commissioners for Shires
 “ or

“ or Boroughs to the Parliament of Scotland ; and therefore, by the
 “ Treaty of Union, are capable to elect or be elected to represent any
 “ Shire or Burgh in Scotland, to sit in the House of Commons of Great
 “ Britain,”—it passed in the negative. On the 6th of December, new
 Writs were ordered for Linlithgow and Aberdeenshire, in the room of
 Lord Johnstone and Lord Haddo, “ declared to be incapable to sit in the
 “ House, being the eldest Sons of Peers of that Part of Great Britain
 “ called Scotland.” The Seats of Lord Strathnaver and Mr. Sinclair were
 afterwards vacated in the same Manner.

No satisfactory Account remains of what was urged upon this Occa-
 sion in the House of Commons. If Chandler’s Debates can be trusted
 to, the Petitioners offered no Proof of their Assertion that Peers eldest Sons
 were incapable by the Law of Scotland, except the Resolutions of 1685
 and 1689 ; and the Advocates on that Side of the Question entered
 into general Declamation concerning the Danger to the Liberties of the
 Commons of Scotland, if the Peers Sons were declared capable, and the
 Expediency of diminishing the Influence of the Peers themselves, by an
 Exclusion of their Heirs Apparent. Chandler says, “ *little was offered*
 “ *on the other Side.*” It is even uncertain, whether the sitting Mem-
 bers appeared by Counsel. A Historian has mentioned, with the
 Appearance of Probability, “ That the Peers of Scotland rested in confi-
 “ dence that the Members would not suffer their eldest Sons to be so de-
 “ graded, since the eldest Sons of the English Peers enjoyed the Pri-
 “ vilege.”

Scot’s His-
 tory of
 Scotland, p.
 746.

The Respect which is due to all Determinations of the House of Com-
 mons, does not permit one to say, That the declamatory Arguments which
 the Petitions shew were principally relied on by those who attacked the
 Right of the sitting Members, could have any Influence, though it is well
 known, that in Election Matters, the House *was* less chaste than in others.

A Writer, who would have been the last to affix a Stigma to their Pro-
 ceedings, if a Regard to Truth and the Constitution had not extorted it

Mr. Hat-
 fell’s Prece-
 dents, Vol.
 ii. p. 13.

from

from him, says, " Under the *former* Judicature for deciding controverted " Elections, every Principle of Decency and Justice were notoriously " and openly prostituted."

In the present Case it appears, from the Way in which the Motion was worded, that the House took up the Matter properly, considering themselves as deciding a Question *of Fact*; namely, What the Law of Scotland on the Point was before the Union; not what it ought to have been, or what was the most expedient Rule for the Time to come. It seems to be highly probable, that the Facts and the Law in favour of the Rights of Scots Peers eldest Sons, were not fully explained to the English House of Commons, who could hardly be Masters of the Subject, and who at that critical Moment might be supposed ready to yield to any Thing represented to be the general Sense and Inclination of the Commons in Scotland. If such Proofs had been then brought, and such Arguments used, as the Case, when now examined, admits of, it will hardly be thought too presumptuous to say the Determination would probably have been different. But supposing the House of Commons, in 1708, had before them all the Lights which the Subject required, it is not yet too late to ask and expect a Reconsideration of it. If the eldest Sons of the Peers of Scotland can show that they were and are eligible by the Law of the Land, their Right cannot be cut off, either by those Resolutions of the Scots Parliament, in 1685 and 1689, or by that of the British House of Commons in 1708; for no Man will pretend, that the Resolutions have in themselves the Force of Law, much less, that they can repeal positive Law. The Resolutions are, at the best, only in execution of what those who made them understood to be the Law; but if they erred, the Error may and must be corrected when discovered and demonstrated. Upon such Principles, sanctioned by the Opinion of the Judges, the House of Lords, in 1782, with a Liberality which does them infinite Honour, reversed a Resolution come to in 1711, whereby the Peers of Scotland had

had been declared incapable of sitting in that House, by virtue of Patents of British Peerage conferred on them after the Union.

The only historical Facts which remain to be stated, are, that in two Instances, viz. That of Lord Charles Douglas, in 1754, and Mr. Charteris, in 1787, the Seats of Scots Members were declared to be vacated, in pursuance of the Rule laid down in 1708, no regular Opposition being made. And two other Cases have occurred, which deserve to be noticed: 1st, The eldest Son of the Duke of Atholl having been attainted, the Honours of that Family were, by Act of Parliament, vested in Lord James Murray, the Duke's second Son, to descend to him at the Duke's Death, as if his elder Brother had been naturally dead. Lord James Murray was then in Parliament, as Member for the County of Perth; and he continued to sit till the Year 1724, when he succeeded to the Title of Atholl, under the Act of Parliament. Though thus made the Heir-apparent of a Scots Title, and in Law, though not in Fact, the eldest Son of a Scots Peer, the Resolution of 1708, and the supposed Rule of the Law of Scotland, recognized by that Resolution, were held not to reach his Case. 2d, Lord Strathnaver, eldest Son of the Earl of Sutherland, died, leaving a Son, called likewise Lord Strathnaver, as Heir-apparent of his Grandfather. This Lord Strathnaver, under that Title, was elected Member of Parliament for the County of Sutherland, and sat unchallenged from 1727 to 1734, when he succeeded his Grandfather in the Earldom. These Instances prove, that the House of Commons hold the Resolution of 1708 to have been made, because they were bound by the Letter of the Law of Scotland; but that they were not bound to go beyond the Letter. The Law of Scotland was supposed to exclude *the eldest Son*, but had not expressly excluded *the Grandson*, though immediate apparent Heir in the Dignity, or one whom an Act of Parliament substituted in the Place of the eldest Son and Heir-apparent; though the Reason of the Thing, and Spirit and Principle of the Law (if any Reason or Principle can be

1 Geo. I.

Journals.

Commons
Journals.

pointed out) must go to the one Case as much as the other. If the Objection of Ineligibility or Incapacity had been taken to Lord James Murray, or to the younger Lord Strathnaver, it was foreseen that their Answer would be, "As Commoners we are eligible, and capable by the general Law: Show us the Exception which applies in Terms to our particular Situation." The Plea was irresistible in the British House of Commons; and yet will any man believe that the Distinction would have been listened to by those who framed the Resolutions of 1685 and 1689? So the eldest Sons of Peers ought to have argued in 1708, and may now argue, "As Commoners we are eligible and capable, under the clear, express, comprehensive Words of the Acts of 1587, 1661, and 1681, if we have in our Persons the Qualification in Land, required by those Statutes. Show us the Law which excludes us, or the Proviso which excepts us. The only Difference between our Case and that of Lord James Murray and Lord Strathnaver, is, that the Words of the Resolutions of 1685 and 1689 were pointed against eldest Sons of Peers; but the Doctrine of these Resolutions, unsupported by any Statute, or by any Writer, and refuted by the Facts and the Statutes we appeal to, cannot be held for Law, or as Evidence of the Law."

Arguments
and Author-
ities against
the Right of
the Peers
eldest Sons
considered.

IV. What has been said or argued on the other Side of the Question is next to be considered. There is not, as already observed, a Syllable in the Statute Book, or a single Dictum in any Writer upon the Law of Scotland, or Constitution of Parliament, before the Union, which gives Countenance to the Idea of the eldest Sons of Peers being excluded. When Lord Stair and others lay down the general Rule, That *all* the King's Freeholders are *obliged* (a Term for which modern Ideas substitute *entitled*) to attend, and that the *Obligation* in the Case of the Lesser Barons was permitted to be fulfilled by the Attendance of Representatives; it seems strange, that no Notice whatever should be taken of an Exception so remarkable and (according to the Writers since the

the Union) so notorious. Either Lord Stair had never heard of the Resolutions in 1685 and 1689, or, which is more probable, he thought them unworthy of the Notice of a systematical Writer.

Soon after the Union, two superficial Treatises upon the Law of Elections for Scotland, were published, one by Mr. Forbes and the other by Mr. Spottiswoode. The first states, in so many Words, That the eldest Sons of Peers are ineligible; but the Resolutions of 1685, 1689, and 1708, are his only Authorities. What Mr. Spottiswoode says, will appear from what shall be immediately quoted from a subsequent Author, Mr. Wight, a Gentleman at the Scots Bar, who, within these few Years, has published a voluminous Work on the Constitution of the Parliament of Scotland, and the present Laws of Election. His great Experience in Election Questions, and indefatigable Industry, entitle one to conclude, that his Treatise contains the Substance of all the Arguments which have been, or which the best Lawyers imagined could be, urged against the Right of the Peers eldest Sons.

“ The eldest Sons of Peers (says Mr. Wight), although infest in
 “ Lands holden of the Crown, of the Extent and Valuation prescribed
 “ by Law, are incapable of electing, or of being elected, and therefore
 “ cannot be admitted to the Roll. For this Spottiswoode assigns the
 “ following Reasons: *That they are QUASI Peers of the Realm, and*
 “ *have a Precedency allotted to them; that by their Birth they enjoyed*
 “ *a Privilege to sit in the Parliament of Scotland, and to bear the Trans-*
 “ *actions in the Meetings of the Estates of the Kingdom, in order to fit*
 “ *them for being worthy Members of that august Assembly, when, upon*
 “ *their Fathers’ Death, they should sit in their Bench; and that, in*
 “ *ancient Times, they were allowed to sit and vote in Parliament as*
 “ *Proxies for Peers.* But although, for a long Time before the Union,
 “ the eldest Sons of Peers were not allowed to sit in the Parliament of
 “ Scotland as Representatives either of Shires or of Boroughs, the
 “ Records afford the most complete Evidence, that, in more ancient

Wight’s In-
 quiry into
 the Rise and
 Progress of
 Parliament.
 Edition in
 4to. B. 3.
 C. 3. pp.
 269, 270,
 271.

“ Times, and before the Representation of Counties came to be thorough-
 “ ly established, they sat in the same Parliaments in which their Fathers
 “ attended as Peers. Instances of this are to be found in the Parlia-
 “ ments 1478, 1481, and 1484; and in the List of the Parliament 1560,
 “ given in Keith’s History, Page 146, we find William Master of Mari-
 “ shall, John Master of Maxwell of Terriglis, Patrick Master of Linde-
 “ say, Henry Master of Sinclair, and William Master of Glencairn.
 “ *Perhaps* they sat on these Occasions in virtue of their *happening to be*
 “ possessed of landed Property; and although we meet with no
 “ *explicit* Enactment of the Legislature abolishing this Practice, no
 “ Instances of its being continued, after the last mentioned Period, are to
 “ be found in the Records. It is also certain, that, for a *considerable*
 “ *Time* before the Union, the eldest Sons of Peers were *understood to be*
 “ incapable of representing either Counties or Boroughs; and as the
 “ Act 1707, Cap. 8. declared that none should be capable to elect
 “ or to be elected as Representatives of Shires or Boroughs in Scotland,
 “ but those who were entitled to that Privilege by the Laws and Con-
 “ stitution of Scotland, they were *thereby effectually debarred* from
 “ having any Voice in the Election of the 45 Commoners to be re-
 “ turned from that Part of the United Kingdom to the British Par-
 “ liament; and a Declaration to that Effect was accordingly made by
 “ a Resolution of the House of Commons in the Parliament of Great
 “ Britain, held in 1708.”

It is worthy of Observation, that Mr. Wight, after laying down the
 Proposition, That the eldest Sons of Peers are incapable, refers to
 Mr. Spottiswoode for the Reasons, without giving any Opinion as to
 the Solidity of those Reasons, and plainly not wishing to have it sup-
 posed that they met with his entire Approbation. What Mr. Spot-
 tiswoode has said, and Mr. Wight has added, as from himself, in the
 Passage just quoted, shall be considered in the Order in which the
 several Particulars are there stated.

1st. *The eldest Sons of Peers are quasi Peers of the Realm.* It is not easy to annex an Idea to the Phrase *quasi Peers*, which is certainly no technical Term, and it is believed occurs no where but in Mr. Spottiswoode. According to him, they were Peers, and no Peers. Peers without one essential Privilege of the Peerage; in every Respect, and in Law, upon a Level with the Commons, except having Titles, by Courtesy, and walking first in a Procession. It is quite ludicrous to assign this as a Reason for their being excluded from having Voices in Parliament.

2d. *They have a Precedency allotted to them.* It would be unnecessary to say a Word on this, even if the eldest Sons of Peers were the only Commoners who had Precedency allotted to them. But what does Mr. Spottiswoode say to the Case of the younger Sons of Peers, and many others, who have Precedency? What would the Man who could assign such a Reason for the supposed Exclusion, have said to the Cases of Lord Strathnaver and Lord James Murray?

3d. *By their Birth they enjoyed the Privilege of sitting in the Parliament to hear the Transactions.* If this were true, it could afford no Reason for denying them an *efficient* Seat when possessed of a Qualification; but there is no Authority for saying they had the Privilege by their Birth. They were admitted to be Auditors by the Favour of Parliament, just as the House of Lords, at this Day, permit the eldest Sons of Peers and others to stand behind the Throne. This appears by an Act or Resolution of Parliament in 1662, which it would be unnecessary to quote here, were it not of some Consequence in another Part of the Argument, as it proves, That the eldest Sons of Peers were not in the Language of Parliament called *Noblemen*, or meant to be described by or comprehended in that Term when used. It declares that “None shall be admitted to stay in Parliament but the
 “ordinar Members of Parliament, viz. The Archbishops, Bishops,
 “*Noblemen*, Officers of State, Commissioners from Shires and Burghs,
 “and the Clerk Register, Deputy, and Servants employed by him
 “to

“ to serve in the House ; and, *besides these, Admittance is allowed to*
 “ *the eldest Sons, and appear and Heirs male of Noblemen*, to the Senators
 “ of the College of Justice, to the Knight Marishall, &c. And it is
 “ ordained, that none presume to sit in the Benches, *save the Nobility*
 “ *and Clergy* ; that the Officers of State sit on the Steps of the Throne ;
 “ that the Commissioners of Shires and Burghs sit on the Forms
 “ appointed for them ; *that Noblemen’s eldest Sons and Heirs aforesaid,*
 “ *fit on the lower Benches of the Throne* ; that the Lords of Session sit
 “ at an Table which is to stand betwixt the Throne and the Commis-
 “ sioners of Burghs.”

Here the Terms *Noblemen* and *Nobility* are applied to those who are themselves Peers in the strictest Sense, in express distinction from their eldest Sons. Let this be compared with the Election-Law of 1661, referred to above.

4th. *In ancient Times they were allowed to sit and vote in Parliament as Proxies for Peers.* Of this Privilege, though it has been commonly asserted, there is no Evidence whatever. On the contrary, there is the strongest Presumption that it never existed. The Acts of Parliament 1425 and 1503 appear to have allowed in early Times all Members of Parliament to attend by Proxy ; that of 1587, C. 34, to have put a Stop to it ; and that of 1617, to have allowed it again to Peers and Prelates. But no Construction of any of the Acts, or Commentary on them, authorises the Idea that the eldest Sons enjoyed a Distinction in this Respect. The Rolls always mention when any Person attended by Proxy, and sometimes give the Names of the Proxies of Peers. In several Instances the Proxies were private Gentlemen, Commoners of no Rank ; *and not one Instance is found of an eldest Son being Proxy for his Father.* But even if it appeared that Peers eldest Sons some Times sat as Proxies for their Fathers, it is evident that they frequently sat in a more independent Capacity ; for, in near Half the Instances of their being marked as attending, *their Fathers were also present.*

So much for Mr. Spottiswoode ; who, after this Discussion of his *Reasons*, will not probably be quoted, on the other Side, as an Authority. It is more probable, that the eldest Sons of the Peers may refer to his Book, as proving how little the Subject was understood in 1708, when a Scots Advocate, professing to write on the Law of Elections in 1710, discovers such profound Ignorance of History and the Records of Parliament.

After quoting Mr. Spottiswoode's *Reasons* in Support of the Rule, That Peers eldest Sons are incapable, Mr. Wight's Acquaintance with the Records led him, and his Candour obliged him, to state Facts which prove that two Centuries ago, when all those *weighty* *Reasons* subsisted in full Force, the Rule was unknown. He says truly, "*That there is the most complete Evidence, that in more ancient Times, and before the Representation of Counties, the eldest Sons of Peers sat in the same Parliaments in which their Fathers attended.*" Consequently, they could not have been sitting as their Fathers' Proxies; and by *sitting*, Mr. Wight must mean as constituent Members, and not attending as Auditors only. He knew that this also was completely proved by the Records.

Instances being given, Mr. Wight proceeds thus: "*Perhaps they sat on these Occasions in virtue of their happening to be possessed of landed Property.*" Mr. Wight felt the necessary Inference from the Facts he had stated ; but it is evident that he considered the Point as settled by the Determinations of 1685, 1689, and 1708, and doubted of the Propriety of disturbing those Determinations. He knew that the Peers eldest Sons must have been entitled to sit when possessed of Property ; for nothing is more certain, than that the Parliament of Scotland was an Assembly of the Landholders, Tenants of the King ; and the legal constitutional Idea was, not that they represented the People, or particular Orders of the People, but that they represented the Land.

The Introduction of Peers by Patent or Investiture, without Reference to Territory, and the admitting of certain Officers of the Crown to Seats in
Parliament,

Parliament, were Innovations of the System ; but with these Exceptions, and at the Time when the Records prove that certain of the eldest Sons of Peers were Members, there is not the Shadow of Reason or Authority for imagining that any Person sat, who had not in himself a Qualification in freehold Land, by virtue of which he was a Member, and by virtue of that alone. It cannot be too often repeated, that the Attendance was a feudal Obligation, and not a Privilege ; an Obligation which none but those liable to it, could be called on to fulfil, or could think of discharging. It is undeniable, that eldest Sons of Peers occasionally attended : It is equally undeniable, that they attended as constituent and efficient Members, being elected of Committees. Nothing short of absolute Scepticism can therefore avoid the Conclusion, that the Peers Sons so entered on the Rolls as attending, sat in their own Right as Freeholders, by virtue of their private Properties, in the same Way as if they had been in the broadest Sense, Commoners, or Sons of Commoners.

Mr. Wight says, this was *before the Representation of Counties came to be thoroughly established*, meaning by the Act 1587 ; and he takes Notice of the negative Fact, of there being no Instance of a Peer's eldest Son sitting after that Period. He admits at the same Time, that there is no *explicit* Enactment of the Legislature abolishing the former Practice : The Word *explicit* is here introduced, as the Word *perhaps* is in the first Part of the Sentence. If it was meant to insinuate that there was some *unexplicit* Enactment, or some Act pointing that Way, Mr. Wight should have referred to it. It has been already shown, that the Act 1587, and all the subsequent Statutes, so far from abolishing the Right, confirm it. If the Act 1587 made no other Alteration whatever upon the Constitution of Parliament, but that of excluding the personal Attendance of the Lesser Barons or Freeholders (under the Degree of Prelates and Lords of Parliament), requiring *their* Attendance in Time to come by Representatives chosen by all those who before had a Title, or were obliged to attend in Person ; and if the eldest Sons
of

of Peers were before that Act obliged to attend when possessed of Freeholds, and actually did attend, but were by the Act excluded as Freeholders, in common with the general Mass; it is impossible to argue, that they were not after the Act, and under the precise Terms of it, entitled to elect and to be elected Representatives of the Freeholders. If such be the fair and obvious Construction of the Act 1587, where is the subsequent Act which either expressly or by Implication took away the Right?

No Instance can be produced of a Peer's eldest Son sitting in the Scots Parliament, by Election, after the Year 1587. But is it a necessary Conclusion, that this arose from their being conscious, or from its being understood that they had no Right? It is otherwise and sufficiently explained by the Principle so often alluded to; *the Obligation to attend had ceased*. There was no Obligation to be elected a Representative. Attendance had hitherto been considered as a Burden from which the Vassals were glad to be relieved, of which the Act 1587 affords Evidence; for, according to it, his Majesty, in dispensing with the Attendance of the Lesser Barons, was bestowing a Favour, and he granted it upon Condition that the Freeholders observed certain Promises they had made him; the Nature of which are now unknown. In the same Light the being Representative was considered for a long Period; the Representative was entitled to his Charges, and regularly demanded them.

There is not a grosser, and yet not a more common Error, than to estimate the Manners and Sentiments of a former Age by those of our own. To the People of the present Times, it seems a natural and almost irresistible Conclusion, from there being no Instance of the eldest Sons of the Peers sitting in Parliament, for more than a Century, that they had no Right, or that if they ever had, it must have been taken away; but when the Circumstances are considered, and the Views and Sentiments of the different Times are compared, the Conclusion is altogether fallacious and erroneous. It

was no Object during the greater Part of the Period in Question for any Person to obtain a Seat in Parliament. It was then shunned as much as it is now coveted; and it was less an Object to the Sons of Peers than to other Gentlemen, because their Consideration in the Country could receive little Addition by that Distinction. It was not till towards the End of the 17th Century, that a Struggle for a Seat was heard of, and not till the very End of it, at the Period of the Revolution, that Contests were carried on with Keeness. The eldest Sons of the Peers of Scotland then put in their Claim, but the Silence of a Century was interpreted against them; and a Rule of Exclusion, referring to no Law or Principle, was adopted to serve the Purposes of Party.

Another Way of accounting for the eldest Sons of the Nobility appearing no longer in Parliament after the Alteration introduced by the Act 1587, is likewise suggested by the Manners of the Age. Those who hesitated not to take their Seats before, in Right of their Freeholds as Barons, and thereby on a Level with the Peers, disdained to come in by Election, to solicit Votes, and to represent a Body of Men whom they considered as their Inferiors. The high Spirit or Pride of the Scots Nobility of those Times was excessive; and, in that Respect, their eldest Sons, according to Mr. Spottiswoode's Phrase, were no doubt *quasi* Peers.

But whatever may have been their Reason for desisting, if it was any other than that a legal Bar had been created, it cannot operate against their Successors, if they can shew incontestably, that their Ancestors had the Right, and were in the Exercise of it.

Mr. Wight goes on to say, *It is certain, that, for a considerable Time before the Union, the eldest Sons of Peers were understood to be incapable of representing either Counties or Boroughs.* A considerable Time, is an Expression far from precise. Mr. Wight, however, can mean only a Period of little more than 20 Years; for till Lord Tarbat dictated the Minute of 1685, there is not the least Authority for saying or supposing that the Idea had entered the Mind of any Man whatever. And if, by

its being *understood*, is meant a *general* Understanding, the whole of the Proposition may be flatly denied. That there should have been a general Understanding on a Point of Law, and a Matter of Constitutional Right in its Nature most remarkable, and yet that no Writer of the Period should have taken the least Notice of it, is utterly incredible. In this Period, Lord Stair, Lord Fountainhall, Sir George Mackenzie, and other eminent Lawyers, composed their Works. They treat of the Constitution of Parliament; and Sir George Mackenzie mentions the Fact of Peers eldest Sons sitting in former Times as *Barons*, without hinting that the Right had been abolished. Could such an Understanding prevail, when Mr. Higgins and his Counsel, in 1689, laying hold of every colourable Objection to the Return of Lord Livingstone, forgot to state the short and decisive one, that he was ineligible as the eldest Son of a Peer? If, by the general Sense of the Country, Peers eldest Sons were by Law incapable of sitting in Parliament, would the Earl of Drumlanrig have been allowed quietly to take his Seat as an Officer of State in 1693? Though the Members *ex officio* certainly needed no Qualification, except their Offices, a legal Disability must have operated against them, as well as others. But, above all, would the Debate, which has been mentioned, have occurred in the Union Parliament, if it had been understood to be a settled Point, that the Peers Sons were ineligible? Would the whole Body of the Nobility, when struggling for the Right of their Sons, have pressed for the Adoption of that Enactment, which declared, That none but those who were by the Law, as it then stood, capable of sitting in the Scots Parliament, should represent Scotland in the House of Commons of Great Britain?

Supposing, for a Moment, that there was such a general Understanding; if founded in Error, can it make, or can it repeal Law? Are Men to be held incapable of sitting in Parliament, because People took it into their Heads that they were so, in the Face of ancient Custom and positive Statutes? It is said, that in Scotland an Act of Parliament may lose its Force and Operation by Desuetude; and therefore, if the Capacity which

the eldest Sons of Peers once enjoyed had depended on any particular Statute, there might be Plausibility, though not Solidity, in such an Argument; because it is evident, that the Neglect or Non-claimer of Individuals could not injure the legal Right of others not connected with them, and then unborn: But the eldest Sons of the Peers stand upon the common Law of the Land, which makes every Man eligible, unless he is disqualified by positive Statute. They are claiming as Commoners, not as the eldest Sons of Peers; and in the former Character the Right has been all along exercised, and under it they must be entitled, unless they stand excluded by some Law pointed against Persons of the latter Character in particular.

It is not the Right of the eldest Sons of the Peers alone which is to be considered; that of *the whole Body of the Electors in Scotland* is involved: Are they to be restrained in their Choice, by a Resolution of one Branch of the Legislature, if that Resolution is not founded in Law, and cannot be argued upon as *public* Law? This Question was so fully and ably discussed on a late memorable Occasion, and, with Submission, is so clear, that it seems unnecessary to do more than hint its Connection with the present Subject.

Mr. Wight concludes, "That as the Act of 1707 declared, That
 " none should be capable to elect, or be elected, Representatives of
 " Shires or Boroughs in Scotland, but those who are entitled to this
 " Privilege by the Laws and Constitution of Scotland, the eldest Sons
 " of Peers were thereby effectually debarred from having any Voice
 " in the Election of the forty-five Commoners to be returned from
 " that Part of the United Kingdom to the British Parliament." Upon this it is enough to observe, that it is a mere begging of the Question. The eldest Sons of the Peers maintain, that they were entitled to the Privilege at the Time of passing the Act of 1707; and therefore are not debarred by it from electing, or being elected, Representatives for Scotland in the House of Commons of Great Britain.

Having thus met every Part of Mr. Wight's Argument, it may be right to take Notice of a few words on this Subject, which occur in
 the

the Works of another Author, and a most respectable one, Lord Bankton, who published his Institutes in 1752. His Lordship says, "The eldest Sons of Peers cannot represent Shires or Boroughs in Scotland; *Because they must have their full Representation, without Encroachment from the Estate of Peers.*" B. 4. Tit. 1. § 41. He quotes no Authority for the Position; and the Reason he gives, shows how difficult it is to figure the Colour of a Reason. The Decision of 1708 had impressed on People's Minds, that such was the Law; and from Spottiswoode downwards, every Writer, supposing there must be a Reason, gives that which first occurs to himself. Here Lord Bankton supposes that Peers eldest Sons are *of the Estate of Peers*. What Ground there can be, for saying People are of an Estate, who do not enjoy a single Privilege of that Estate, may be submitted to the common Sense of every Person.

The Acts of Parliament which have been referred to, relate only to the Elections for Counties; and it may be observed, perhaps, that nothing has been said on the Right of representing the Boroughs in Scotland; but it is unnecessary, because it will be admitted, that if the eldest Sons of the Peers are entitled to be elected for the Counties, they must be capable to represent the Boroughs likewise. It was common, down to the Time of the Union, for those who belonged properly to the Estate of Barons, to be elected Commissioners for Boroughs; and an Attempt in the last Century to check the Practice, proved abortive. In a Word, it is now established, that no Qualification is necessary, to be elected for Scots Boroughs, and every British Subject, under the Degree of a Peer, is eligible, unless excluded by some positive Act of the Legislature, on account of personal Situation.

UPON THE WHOLE MATTER,

As it is undeniable, that the eldest Sons of the Peers sat in Parliament before the Year 1587, as Commoners or Lesser Barons, in their own Right, when possessed of Freeholds:

As

As the only Alteration in the Constitution, since that Period, is that the Lesser Barons sit by their Representatives, instead of attending personally or individually :

As the Intention of the Act 1587, was to bestow the Right of electing, or being elected, Representatives, upon all the Lesser Barons so discharged from personal Attendance :

As by the unequivocal Terms of that, and all the subsequent Election Statutes, the Right is vested in *all Freeholders* under the Degree of Prelates and Lords of Parliament, possessed of Land to a certain Extent, and there is not a Word in any of the Acts excepting Peers eldest Sons, being Freeholders, either directly, or by any Implication :

As the Determinations of the Scots Parliament in 1685 and 1689, had no Foundation in the Law or Constitution of Scotland, and are accounted for from the Circumstances and Spirit of the Times :

As the Determination of the British House of Commons in 1708, appears to have been founded singly on the Scots Precedents ; and there is every Reason to think that the Matter was not properly explained upon that Occasion :

And as the Right of electing, or of being elected, if vested by Law, cannot be lost by disuse :

It is to be expected, from the Justice, Liberality, and good Sense of the proper Judicature, That, upon a Reconsideration of the Question, and of the Evidence here alluded to, or other satisfactory Evidence to be laid before them, the Principle of the Resolution in 1708, as erroneous, will be REVERSED ; and that the eldest Sons of the Peers of Scotland will be declared entitled by Law to sit as Representatives of the Commons of Scotland in Parliament.

A P P E N D I X, N^o I.

Copy of the Roll of Parliament 1481.

XIII Aprilis in dicto Parlamento pntibus Willmo Archiepiscopo Sancti Andree, Johanne episcopo Glasguen, Jacobo episcopo Dunkelden, Roberto episcopo Aberdonens; Abbatibus de Kelsow, Corfraigwell, Halywood, Priore de Inchmaquholme, ... Domino Cancellario, Comitibus de Angusie, Ergile, Athole, Buchane, Monteith, Mersschell, et Rothes; Dominis de Dernlie, *Erskin*, Oliphant, Glammys, Cathkert, Gray, Carlile, Lyle, Kennedy; preposito de Lincowden, Secretario, Clerico registri, preposito Sancti Andree; Officiale Laudonie; Magistro Alex^{ro} Murray, Magistro Georgio de Carmychell, Rectore de Flysk; preceptore de Torfychin; Roberto Crechtown de Sanquhare *Magro de Erskin*, David Lindissay milite, Domino de Dalwolsy, Dno de Bas, Domino Jacobo Liddale milite, *Magro de Halys*, Dno de Corstorphin, Jacobo Crechton de, Johanne de Haldane, Johanne Murray de Tuchadam, Arthuro Forbes, Gilberto Johnestoune, Dno de Torry, Waltero Stewart, Johane Ross de Montgrenane, Dno Jacobo Crechtoune de Carnys; *Magro* Ricardo Lawfone; David Rollock Commissario de Dundee, Archebaldo Manderstoun Commissario de Berwick, Bertholomeo Carnys, Alex^{ro} Turing, et Alex^o Bonkill Commissariis de Edinburgh, Johane Hadingtoune Commissario de Perth, ... Commissario de North Berwick.

APPENDIX, N° II.

Copy of the Roll of Parliament 1478.

PARLIAMENTUM excellentissimi principis, & dñi nr̄i dñi Jacobi tertii dei gra Scotorum regis illustr^{mi} tent. & inchoat apud Edinburghi primo die mensis Martii anno dñi 1478 Sectis vocatis et curia Affirmat Absen patent ad extra

Comparuerunt

Epi

Glasguen
Dunkelden
Aberdonen
Moravien
Brechinen
Dumblanon
Ergadien
Orkaden

Abbtēs

Prior Stiandri
Abbas de cales
Abbas de Abberbrothok
Abbas sancte crucis
Abbas de Melrofs
Abbas de Scond
Abbas de Kilwynning
Abbas de Lundoris
Abbas de Newbotle
Abbas de Inchechaff
Abbas de columbe

Coītes et barones

Comes de Marr
Comes Atholie
Comes Angusie
Comes Craufurdie
Comes Buchanie
Comes de Ergile
Comes de Menteth
Comes de Mortoun
Comes de Rothas
Comes de Eroule Conastab^{us} Sco.
Comes Merschiale Mar^{ius} Sco.

Abbas

Abbas de Jedworth
 Abbas de Corfagwell
 Abbas de Culrofs
 Abbas de Dundranane
 Abbas de Pasleto

Dni Parliati

Dns Avandale cancellarius
 Dns de Erskyn
 Dns Deraly
 Dns Haliburtoun
 Dns Maxwell
 Dns Sommerville
 Dns Lindefay de Byris
 Dns Kennedy
 Dns Kilmawaris
 Dns Flemyng
 Dns Crechtoun
 Dns Borthwick
 Dns Glamis
 Dns Graye
 Dns Seytoun
 Dns Oliphant
 Dns Caithkert
 Dns Lyle
 Dns de Innermeth
 Dns Carlile
 Dns Hume

Barones

Preceptor de Torfichen
 Dns de Yester
 Dns de Bafs
Magr de Halis
Magr de Erskyn
 Dns de Pettrufy
 Dns de Caldor
 Dns de Ochiltre
 Willm^m Edmondstoun de Duntreth

Burgorum Commissarii

Berwick
 Jedwort
 Selkirk
 Peblis
 Lanark
 Dumfres
 Wigtoun
 Kirkudbryt
 Aire
 Irwin
 Dumbretain
 Strivelyne
 Linlithgw
 Edinburgh
 Hadingtoun
 North berwic
 Dunbar
 Kingorne
 Innerkethin
 Caraile
 Couper
 Saintandros
 Perth
 Forfare
 Dundee
 Brechin
 Monthrofs
 Abirdene

Dns de Auchinlek
 Dns de Halkete
 Dns de Dalwoulfy
 Dns de Haltoun
 Dns de Cragy Wallace
 Dns de Luse
 Dns de Stobhall
 Dns de Tulibardin
 Dns de Elliotistoun
 Dns de Halkeristoun liddale
 Dns de Leftalrig

N. B. Under the Title *Barones* none of the Nobility are included. *Dominus* de Yester, is the *Laird* of Yester, or Owner of the Lands of Yester. There was no such Title of Nobility as Yester at this Period. There never was such a Title of Nobility as *Bass*. And thus the *Masters* of Hales and Erskin, eldest Sons of the Lords Hales and Erskin, are here classed as *Lesser Barons*, after the *Lairds* of Yester and *Bass*.

The Original of this Roll, and many others, is in Columns, and blank Spaces left, as here represented.

(2)